Petition

81-1709

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No. 81-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HAWAIIAN AIRLINES, INC., *Petitioner*,

v.

NATIONAL MEDIATION BOARD, *et al.*, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the National Mediation Board may disregard the procedural regulations contained in its Mediators Manual, which require that mediators advise carriers of (1) the time for filing objections to eligibility determinations; (2) their rights to appeal the Mediator's decisions; and (3) the time and procedure for filing such appeals.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Jurisdiciton	1
Statutory Provisions Involved	2
Statement of the Case	3
Statement of Facts	3
Reasons for Granting the Writ	6
Conclusion	10
Appendix A	1a
Appendix B	4a

TABLE OF AUTHORITIES

CASES: Page

Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 7

Chrysler Corp. v. *Brown*, 441 U.S. 281, 294-308, (1979) .9, 10

Intern. In-Flight Catering v. *NMB*, 555 F.2d 712, 718-719 (9th Cir. 1977) 10

Morton v. *Ruiz*, 415 U.S. 199, 235 (1974) 9

Sedalia-Marshall-Boonville v. *NMB*, 574 F.2d 394, 396 n.3 (8th Cir. 1978) 10

Service v. *Dulles*, 354 U.S. 363, 388-389 (1957) 6, 7

United ex rel. Accardi v. *Shaughnesy*, 347 U.S. 260 (1954) 7

United States v. *Heffner*, 420 F.2d 809 (4th Cir. 1970) ... 8

Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 6, 7

Yellin v. *United States*, 374 U.S. 109 (1963) 8

STATUTES AND OTHER AUTHORITIES

Railway Labor Act

45 U.S.C. § 151 3

45 U.S.C. § 152 2

45 U.S.C. § 154 3

45 U.S.C. § 155 3

45 U.S.C. § 181 3

The Mediator's Representation Manual

Section 326.5 3

Section 329.0 4

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HAWAIIAN AIRLINES, INC., *Petitioner*,

v.

NATIONAL MEDIATION BOARD, et al., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Hawaiian Airlines, Inc., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 16, 1981.

OPINIONS BELOW

The unreported opinion of the Court of Appeals issued on November 16, 1981, (Appendix A, infra, pages 1a through 3a), affirmed an Order of the U.S. District Court for the District of Hawaii (Appendix B, infra, pages 4a through 7a.)

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 24, 1981. A timely petition for rehearing *en banc* was denied on November 16, 1981, at which time the Ninth Circuit withdrew its decision of July 24, 1981 and issued an amended memorandum decision. By Order dated February 2, 1982, the Honorable William H. Rehnquist extended the

time to file this Petition for Writ of Certiorari until March 15, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 45
§ 152. General Duties

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF THE CASE

Petitioner Hawaiian Airlines, Inc., brought an action for injuctive relief and declaratory judgment against the National Mediation Board (hereinafter "NMB") and certain of its officers and agents. The NMB filed a motion to dismiss the complaint or for summary judgment. Thereafter, Hawaiian Airlines, Inc. filed a cross motion for summary judgment.

The District Court awarded summary judgment to the NMB and denied Hawaiian Airlines' motion for summary judgment. The Ninth Circuit affirmed the decision of the district court.

STATEMENT OF FACTS

Hawaiian Airlines, Inc. is a "carrier" as defined in the Railway Labor Act (hereinafter "RLA") 45 U.S.C. §§ 151, 181. As such, it is subject to the jurisdiction of the NMB, an independent federal adminstrative agency established pursuant to the provisions of the RLA (45 U.S.C. §§ 154, 155).

The NMB was established to administer the provisions of the Railway Labor Act. That statute provides, *inter alia*, for the resolution of representation issues concerning whether employees wish to be represented by a labor organization. To fulfill this statutory mandate, the NMB has promulgated the "Mediator's Representation Manual" which sets forth procedures to resolve representation disputes. The "Mediator's Representation Manual" requires NMB Mediators to advise carriers as to the time for filing objections, the right of carriers to appeal the Mediators decisions and the time and procedure for filing appeals. The pertinent provisions are as follows:

> Section 326.5
>
> *Timeliness:* The Mediator should impress upon the representatives the necessity for filing timely objection. Due to variables, such as the size of the electorate and/or the availability of information, no specific time limit can be set for filing objections. However, as a general rule, the

mediator should advise the representatives that objections filed less than one week prior to the established date for the ballot count will be considered by him as untimely.

Section 329.0

Appeal Rights: After the mediator has delivered his decisions, he should advise the representatives of their rights to appeal his decisions to the NMB.

The mediator should advise the representatives that their positions and his decisions will be reported to the NMB.

It is the mediator's responsibility to establish a date certain within which appeals may be made to the NMB. No representatives shall be given more than ten calendar days to file appeals with the NMB, unless specifically authorized by the NMB. The mediator should advise representatives desiring to appeal that their appeals must be supported by evidence and argument and not merely contain unsupported allegations. Appeals must be made in writing. If possible, the NMB should be afforded sufficient time prior to the count of ballots to analyze the record and issue decisions. [Emphasis added.]

On August 5, 1977, the NMB received an application to investigate a representation dispute among certain employees of Hawaiian Airlines denominated by the Union as "Sales Representatives." An NMB Mediator was assigned to investigate the dispute. As part of its investigation, the NMB was required to determine which employees would be eligible to vote in the representation election.

Hawaiian Air provided the Mediator with a list of the employees that were classified as Sales Representatives together with their personnel files. The Mediator unilaterally eliminated certain employees from this list. In addition, the Mediator *sua sponte* added a person to the eligibility list that was classified by the Airline as management and hence not eligible to vote. The Mediator did not, however, investigate whether there were

individuals in similar positions to that of the manager who might also be eligible to vote.

The Mediator did not at any time advise Hawaiian Airlines that it had the right to object to or appeal his eligibility determinations.[1] The Mediator did not give Hawaiian Airlines anything in writing setting forth its rights to object to the eligibility determinations or the procedure to do so.

On November 8, 1977, the NMB sent to Hawaiian Airlines the official list of eligible voters. This list was not received until November 14, 1977. On November 22, 1977, one day after the election, Hawaiian Airlines filed written objections to the eligibility list used by the Mediator on the grounds that said list included ineligible voters and did not contain all eligible voters.

The NMB notified Hawaiian Airlines on November 30, 1977, that its objections were rejected as untimely. The reason for the delay in making objections is directly attributable to the failure of the NMB's mediator to advise Hawaiian Airlines of its appeal rights and time deadlines in accord with the NMB's Mediator's Manual.

On December 1, 1977, the NMB issued a certification which showed that of 25 eligible voters, 13 voted for union representation. Thus the Union won the election by only one vote. The Mediator's unilateral eligibility determinations clearly could have affected the outcome of the election. Hawaiian Airlines and the Union have stayed bargaining pending resolution of the issues raised by this case.

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[1] The NMB conceded at oral argument before the district court that ". . . Now, the mediator did not, apparently tell [Hawaiian Airlines] 'you have the right to appeal this decision. You can do that. You must do it within a certain amount of time.' I think he did not do that for reasons that appear reasonable. . . ." (Tr. 43)

REASONS FOR GRANTING THE WRIT

1. Counsel for the NMB conceded at oral argument before the district court that the mediator did not follow the NMB's Mediator's Manual. This unwarranted departure from the NMB's established procedures resulted in the denial of important procedural rights to Hawaiian Airlines. Accordingly, the judgment of the Ninth Circuit must be reversed.

This Court has consistently recognized that administrative agencies are required to follow their own procedures. In *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), for example, the Secretary of the Interior discharged an employee on national security grounds. Although the department had the power to dismiss the employee without giving any reason, it was held bound to afford the employee the procedural safeguards provided in an order relating to discharges on security grounds because the termination was based on such grounds. As the discharge did not comply with the requisite procedural safeguards, it was ruled illegal:

> It is true that the Act of August 26, 1950, and the Executive Order did not alter the power of the Secretary to discharge summarily an employee in petitioner's status, without the giving of any reason. Nor did the Department's own regulations preclude such a course. Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated in Order No. 2738 for the dismissal of employees on security grounds. . . . Having chosen to proceed against petitioner on security grounds, the Secretary . . . was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily. 359 U.S. at 539-540.

Service v. *Dulles*, 354 U.S. 363, (1957), involved the validity of the discharge of a Foreign Service Officer by the Secretary of State. The Secretary of State had absolute statutory

power to discharge an employee "whenever he shall deem such termination necessary or advisable in the interests of the United States. . . ." However, departmental regulations subjected the exercise of this power to certain substantive standards and procedural regulations. As these regulations were not followed, this Court held that Service's termination was void, notwithstanding the absolute power set forth in the statute. The Court expressly noted as follows:

> While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so . . . and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

354 U.S. at 388-89; see also *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

The Ninth Circuit disregarded this Court's decisions in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); and *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). While, it is true that the NMB was neither required to adopt the Mediator's Manual nor was it required to expressly provide for objections to eligibility determinations and appeal rights, once it did so it was not free to disregard its own regulations. The Ninth Circuit's decision, if permitted to stand, sanctions the NMB's unwarranted departure from its established guidelines in direct violation of this Court's precedent.

2. The Ninth Circuit stated that ". . . the Mediator's Manual is merely an internal statement of agency policy. It creates no substantive rights" (App. at 3a). This conclusion is clearly erroneous. First, this case was resolved by summary judgment before any discovery on the use or nature of the Mediator's Manual. Second, the establishment of the right to appeal and the time limits for doing so by regulation obviously confer important procedural rights on carriers. Although the

RLA may not require the conferring of such rights, once they are established, compliance may not be arbitrary, discriminatory or capricious.

Furthermore, the Supreme Court has expressly disavowed the Ninth Circuit's conclusion. In *Yellin* v. *United States*, 374 U.S. 109 (1963), a House Committee refused to abide by its own rule of considering a request by a witness to be heard in executive rather than in public session. The Committee sought to justify its refusal on the ground that the rule in question "was written to provide guidance for the Committee alone and it was not designed to confer upon witnesses the right to request an executive session and the right to have the Committee act . . . according to the standards set forth in the rule." 374 U.S. at 115. The Court rejected that contention holding, after an examination of the Committee's files, that they "[a]ll . . . work for the witness' benefit." 374 U.S. at 116. The same conclusion obviously applies to the notice of appeal rights and procedures and the deadline for filing appeals that the mediator was required by the NMB to give to Hawaiian Airlines in this case.

3. It is well established that an agency is not permitted to deviate from its practices and procedures even if the agency has not undertaken to formalize its procedures pursuant to the Administrative Procedures Act. For example, in *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1970), the Court stated as follows:

> Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally labeled a "Regulation" or adopted with strict regard to the Administrative Procedure Act; the *Accardi* doctrine has a broader sweep. The Supreme Court in *Vitarelli* v. *Seaton*, *supra*, applied it to a Department of the Interior "Order." The Second Circuit has applied it to the Army's "Weekly Bulletin 42," § 4(c) (Oct. 20, 1979). *Smith* v. *Resor*, 406 F.2d 141, 143-144 & n. 2, 146 (2nd Cir. 1969). The District of Columbia Circuit has applied the doctrine to a

> FCC "rule" which had not been formally promulgated but which the court found had been established by the FCC's "usual practice" of including the rule in its orders. *Snagamon Valley Television Corp.* v. *United States*, 106 U.S. App.D.C. 30, 269 F.2d 221, 223-225 & nn. 8 & 9 (1959). See also *McKay* v. *Wahlenmaier*, 226 F.2d 35, 43 (D.C. Cir. 1955) (alternative holding). The same court has also applied the doctrine to FCC "standards." *American Broadcasting Co., Inc.* v. *FCC*, 85 U.S. App.D.C. 343, 179 F.2d 437, 442-443 (1949). Finally, in *United States ex rel. Brooks* v. *Clifford*, 409 F.2d at 706, this court applied the doctrine to a Department of Defense "Directive."
>
> These cases are consistent with the doctrine's purpose to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures. As the Second Circuit, said in *Hammond* v. *Lenfest*, 398 F.2d at 715, cited with approval in *United States ex rel. Brooks* v. *Clifford*, 409 F.2d at 706, departures from an agency's procedures "cannot be reconciled with the fundamental principle that ours is a government of laws, not men." The arbitrary character of such a departure is in no way ameliorated by the fact that the ignored procedure was enunciated as an instruction in a "News Release." The document purports to establish certain procedures which Special Agents are "required" to follow. Undoubtedly, a failure to comply is a rare event within the Intelligence Division — a fact which highlights the apparently inadvertent failure to give the required warnings here. Furthermore, a reversal here would not only have the salutary effect of encouraging the IRS agents to observe their own procedures . . . but would assist the IRS in fulfilling its own important stated purpose in requiring that the warnings be given.

See also *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974)

The Ninth Circuit relied on *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979) to permit the NMB to disregard its Mediator's Manual. That case, however, did not involve the failure of an administrative agency to follow its own regulations and does not appear to signal a retreat or a reversal from this Court's long line of precedent requiring administrative agencies to adhere to

their own established policies and procedures. Rather, *Chrysler* v. *Brown*, for purposes here relevant, merely addressed the circumstances under which agency action can be deemed to have the "force and effect of law," so as to be binding on courts and private litigants, in a manner akin to statutes (441 U.S. at 294-308).

The NMB has been chastised by courts because their ". . . procedures are out of tune with the realities of modern labor-management relationship and current due process concepts" (*Sedalia-Marshall-Boonville* v. *NMB*, 574 F.2d 394, 396 n.3 (8th Cir. 1978); see also *Intern. In-Flight Catering* v. *NMB*, 555 F.2d 712, 718-719 (9th Cir. 1977). While federal courts have been justifiably hesitant to compel reformation of the NMB's procedures, there should be no reluctance to compel the NMB to adhere to its own Mediator's Manual. The NMB's failure to adhere to those minimal procedures set forth in its Representation Manual not only exacerbates and accentuates the problems recognized by several federal courts, but also disregards well established decisions of this Court. To maintain the integrity of this Court's precedent, the decision of the Ninth Circuit must be reversed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

79-4265

HAWAIIAN AIRLINES, INC.,

Plaintiff-Appellant,

v.

NATIONAL MEDIATION BOARD;
K. K. MCMURRAY, as Chairman of the
National Mediation Board;
GEORGE S. IVES and DAVID H. STOWE,
as members of the National Mediation Board;
and ROWLAND K. QUINN, JR., as Executive Secretary
of the National Mediation Board,

Defendants-Appellees.

ORDER

Before: CHOY and REINHARDT, Circuit Judges, and KELLEHER*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The Memorandum decision which was filed on July 24, 1981 is withdrawn and the enclosed amended Memorandum shall be substituted in its place. It incorporates within it a denial of the petition for rehearing and suggestion for rehearing en banc.

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* The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4265
DC 78-0308

HAWAIIAN AIRLINES, INC.,
Plaintiff-Appellant,

v.

NATIONAL MEDIATION BOARD;
K. K. MCMURRAY, as Chairman of the
National Mediation Board;
GEORGE S. IVES and DAVID H. STOWE,
as members of the National Mediation Board;
and ROWLAND K. QUINN, JR., as Executive Secretary
of the National Mediation Board,
Defendants-Appellees.

MEMORANDUM

Appeal From The United States District Court
For The District Of Hawaii
Bruce R. Thompson*, District Judge, Presiding
Argued And Submitted — February 12, 1981
As Modified, Rehearing And
Rehearing En Banc Denied

Before: CHOY AND REINHARDT, Circuit Judges, and KELLEHER**, District Judge

In August 1977, the National Mediation Board received an application by the International Association of Machinists and Aerospace Workers, AFL-CIO to investigate a representation dispute

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* Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

** Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

among certain employees of appellant Hawaiian Airlines denominated as sales representatives. Pursuant to section 152, Ninth, of the Railway Labor Act, the Board assigned a mediator to investigate the dispute. In the district court, seeking injunctive and declaratory relief, appellant contested the Board's subsequent determinations of voter eligibility by challenging the nature and extent of the investigator's actions. On February 16, 1979, the district court granted the Board's motion for summary judgment on the ground that Congress did not empower the federal courts to review the sufficiency of an investigation. Hawaiian Airlines appeals from that decision.

Once the district court determines that the Board met its statutory obligation to investigate a representation dispute, it lacks the authority to inquire further into the kind or quality of the investigation or to impose judicial standards on the Board's reviewing process. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 303 (1943); *see Sedalia-Marshall-Boonville* v. *National Mediation Board*, 574 F.2d 394 (8th Cir. 1978). Since the district court correctly found that the Board conducted an investigation, its further determination that it could not review the quality of that investigation also was correct. Accordingly, we affirm the decision of the district court.

Appellant also argues that the Board failed to adhere to its own rules and regulations and that, therefore, it was deprived of due process. Appellant incorrectly asserts that the Board's Representation Manual is a set of agency rules and regulations that have the force of law. On the contrary, the Manual is merely an internal statement of agency policy. It creates no substantive rights. Furthermore, unlike binding rules and regulations, the Manual's guidelines were neither promulgated pursuant to specific statutory authority nor issued in accordance with the procedural requirements of the Administrative Procedure Act. 5 U.S.C. § 553 (1976). *See Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301 (1979).

Appellant's petition for rehearing and suggestion for rehearing en banc are denied.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 78-0308

HAWAIIAN AIRLINES, INC.,

Plaintiff,

v.

NATIONAL MEDIATION BOARD *et al.*,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This is an action brought by Hawaiian Airlines, Inc. to set aside a certification made by the National Mediation Board pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C. 152). The Board certified the International Association of Machinists & Aerospace Workers AFL-CIO as the duly authorized collective bargaining representative for the class of Sales Representatives employed by the Carrier.

Defendants rely upon *Switchman's Union* v. *National Mediation Board*, 320 U.S. 297 (1943) and *Brotherhood of Railway Airline and Steamship Clerks* v. *Association for the Benefit of Non Contract Employees*, 380 U.S. 650 (1965) for the broadly stated proposition that suits challenging the Mediation Board's determination of employee voting eligibility are prohibited by the Railway Labor Act. The cases cited do so construe the Act as to bring the Board's determinations within an exception to the Adminstrative Procedure Act excluding judicial review where "statutes preclude judicial review." 5 U.S.C. 701(a)(1). So, we must infer that whatever judicial action vis-a-vis a Mediation Board determination is sanctioned, such action cannot enjoy the scope of review of final agency action

available under the Administrative Procedure Act (5 U.S.C. 706)* In the opinion of this Court plaintiff has approached this case as if the authorized objective is in fact to review the Mediation Board record from stem to stern and to apply to it all the review standards enunciated in section 706, supra. In our opinion, the Supreme Court in the *Switchmen's Union* case, supra, has plainly said that this cannot be done.

Plaintiff relies upon the Ninth Circuit decision in *International In-Flight Catering Co. Ltd* v. *National Mediation Board*, 555 F.2d 712 (9th Cir. 1977). The court there found jurisdiction despite the *Switchmen's Union* case, and held: "However, we find that reviewing a certification after an investigation by the NMB and reviewing whether the NMB made its statutory investigation at all are two

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* To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

completely different matters." In the *In-Flight Catering* case the court emphasized the Board's statutory duty in section 2, Ninth of the Railway Labor Act "to investigate the dispute," and identified the dispute as the contention "that the cards signed by the employees only called for an election and were not votes for representation without an election." In that case the NMB failed to investigate the contention at all but arbitrarily used the signed cards as votes.

The instant case is quite different. Here the dispute is about the identification of the employees qualified to vote in the election. This is a subject matter which is separately treated in the Act (45 U.S.C. 152, Ninth). In addition to enjoining the Board "to investigate such dispute" the statute states: "In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election . . ." This specific mandate to the Board is exactly the kind of language relied upon by the Supreme Court in *Switchmen's Union*, supra, to support the conclusion that such a designation by the Board is not reviewable by the courts.

This record does not confront us with a failure to investigate. The mediator obtained the original list of employees in the class of sales representatives from plaintiff. After investigation and consultation with the carrier representative and the union representative, the mediator struck three names and added one, all pursuant to an exercise of judgment in application of the "preponderance test" recognized by the Board to resolve situations where an employee works in more than one job area or classification. The carrier representative signed the list of eligible voters. The mediator says he approved it. The carrier representative now says he didn't. If he didn't intend to approve it, it is difficult to imagine any good reason why he, as the designated carrier's representative, should have signed it. Of course, in a different kind of case this credibility issue would preclude summary judgment. But this is exactly the kind of quibble which the Supreme Court precluded the courts from entertaining when in *Switchmen's Union* it observed that there should be "no dragging out of the controversy into other tribunals of law."

Plaintiff also argues that the mediator did not follow "Mediators Representation Manual" issued by the Board for the guidance of its

mediators. Here again we have the kind of issue which might be entertained under the Administrative Procedure Act as an agency action found to be "without observance of procedure required by law." The contention is not a justiciable one under the *Switchmen's Union* case. It further may be observed that if, as the mediator's report says, the list of eligible voters was approved by the carrier and union representatives, there were no procedural irregularities (Mediator's Manual, sec. 310.4). Finally, the Mediator's Manual is represented by the Board to be directory only for the guidance of the mediators. It is not a compilation of regularly promulgated regulations having the force and effect of law.

In the light of established precedent, the defense motion for summary judgment must be granted.

Accordingly,

IT HEREBY IS ORDERED:

1. Plaintiff's motion for summary judgment is denied.

2. Defendant's motion for summary judgment is granted and the action is hereby dismissed.

DATED: February 16, 1979.

/s/ BRUCE R. THOMPSON

UNITED STATES DISTRICT JUDGE